No. 22597

United States Court of Appeals
For the Ninth Circuit

L. B. Foster Company, Inc.
Appellant,

vs.

Melvin Hurnblad, and Grace Hurnblad, his wife,
Appellees.

Appeal from the United States District Court for the Western District of Washington, Southern Division

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APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an appeal from the entry of judgment in favor of the plaintiff in a diversity-tort action (R. 181)* and from the denial of the motions for judgment notwithstanding the verdict and for a new trial (R. 188). The District Court had jurisdiction under 28 U.S.C.A. § 1332 as this was an action by plaintiffs, who are Washington citizens against Sim Knight, L. B. McGowan, Transport Supply Company, L. B. Foster Company, Inc., and David Paul's Eastport Dodge, Inc., who are all citizens of other states, and the amount of the controversy was in excess of $10,000 (R. 112-113). This Court has jurisdiction under 28 U.S.C.A. § 1291.

*Parenthetic references preceded by "R." are to the record. All other parenthetic references, unless otherwise indicated, are to the transcript of the testimony.

STATEMENT OF THE CASE

A. The Nature of the Controversy

This action arose out of an accident occurring on December 9, 1963, in Tacoma, Washington, between an automobile operated by the respondents and a semi trailer-truck owned by Sim Knight and L. B. McGowan (defendants herein and hereafter referred to as Knight and McGowan) and operated by Sim Knight. Knight's brakes failed and he ran a red light, striking the respondents.

Events giving rise to this action began to coalesce about the first of August, 1963. It was at that time that Dodge City, Inc., (whose name is now David Paul's Eastport Dodge, Inc., a defendant herein), a Portland, Oregon car and truck dealer, had in its possession a 1946 Peterbilt tractor and a Pointer Willamette trailer. The brakes on the tractor were found to be wanting and Mr. Ross McCullough, a mechanic at Dodge City, relined the rear brakes on the rear axle of the tractor and turned the drums (579). During August, 1963, Knight and McGowan came in to Dodge City, Inc. looking for a truck. On September 5, 1963, Mr. Billie Foumal sold Knight and McGowan the Peterbilt tractor and the Pointer Willamette trailer (608).

Knight and McGowan then became engaged in the business of hauling hay from Madras, Oregon, to Tillamook, Oregon (410). This continued over several months until the Tillamook dairymen went on strike and eliminated the truckers' buyers (414). Knight then began to look for someone else for whom he could haul. He was put in contact with the other principal de-

fendant, Transport Supply Company. He contacted by telephone a Mr. Onthanks, who set him up to haul a load of shakes from Portland to Sacramento (338). This was in early December, 1963. Having delivered the shakes, he called Mr. Onthanks from Sacramento whereupon he was advised to go to San Leandro to The Bigge Drayage Co. yard (355-360). These two phone calls were the extent of Knight's contact with Transport Supply Company before the accident (339, 355).

The additional defendant and appellant, L. B. Foster Company, Inc., (hereinafter referred to as Foster), a steel warehousing and fabricating company, received a call in late November, 1963, from Traylor-Pamco of Bellevue, Washington (516). Traylor-Pamco wanted 200 lengths of used railroad rails together with 400 splicing bars for the rail. The sale was arranged by Mr. Felix Baker, a salesman for Foster. Terms required that Foster arrange the transportation and prepay the freight. Mr. Baker was unable to get his usual carrier, Mitchell Bros. Trucking Company (517). At about this time, Transport Supply called Baker and said that they had a truck in the area and inquired as to whether Foster had any business to send their way (517). Baker said they did need a truck and told them where to pick up the shipment of steel (517). Transport Supply had picked up loads from Foster on two previous occasions, November 24, 1963, and December 3, 1963 (276 & 277) and billed for them on December 14, 1963 (278) and December 7, 1963 (524), respectively. These were received by Foster after the shipment in question.

Thus, on December 7, 1963, Knight pulled his truck

into the San Leandro supply yard. The San Leandro yard was owned by the Bigge Drayage Company. Foster leased a storage space in this yard from the Bigge Drayage Company (444). Foster had two employees at the yard, a watchman, Mr. Charles Showalter, and a clerk-telephone operator, Mr. F. Connors (475). The steel rail was loaded on the trailer under the direction of the driver, Knight, by employees of the Bigge Drayage Company. After having been loaded to his satisfaction, Knight took his truck and headed for Seattle.

Knight spent the night of December 8, in Portland. He took off early the morning of December 9 to complete his trip to Seattle (364). While coming down Wakefield Drive in Tacoma at about 8:00 A.M. that morning, the brakes on Knight's truck-trailer combination failed (367). He proceeded down Wakefield Drive to the intersection of Pacific Avenue. He managed to make a left turn through a red light at the intersection, and then proceeded one block into the intersection of 25th and Pacific Avenues. It was at this point that Mr. and Mrs. Hurnblad, the plaintiffs, came in contact with Knight. They were proceeding through the intersection on 25th Avenue. Knight's truck collided with the passenger's side of the Hurnblad station wagon.

Respondents brought suit against Knight and McGowan, Transport Supply, the company which had contracted with Knight to haul the steel rails, and Dodge City, Inc., now called David Paul's Eastport Dodge, Inc., who sold the truck to Knight and McGowan. In addition, he brought suit against the shipper of the goods, Foster, which had contracted with Transport Supply who in turn had contracted

with Knight, the driver and owner of the truck.

On page six of the pre-trial order, (R. 117), the four allegations of negligence against Foster are set forth. The allegations are:

1. That defendant Foster failed to use reasonable care to employ a careful and competent contractor to do the work which involved a risk of physical harm unless it was carefully and skillfully done.

2. Defendant Foster negligently loaded the trailer in question.

3. Defendant Foster negligently overloaded the tractor in question with a commodity that it was no designed to carry.

4. Defendant Foster violated the provisions of the Motor Carrier Act. 49 U.S.C.A. § 322(c).

Plaintiff's first witness, Mr. James T. Connor, of the Pacific Inland Tariff Bureau, gave most of his testimony over the continuous objection of the defendants (17, 18, 20, 32). He testified that the charge made by Transport Supply to Foster was below that which could be charged by any carrier he knew of (20, 23, 27, 31), that Transport Supply could not make a profit if these were round trips (32), and that the invoice sent to Foster by Transport Supply would put him on notice that something was amiss (49-50) to which defendant again objected (49, 50).

Plaintiff called Mr. Richard Davidson of the Tacoma Police Department, who related what he saw at the accident scene. He also testified that Knight told him he lost his air coming down the hill (92),

that he had been driving truck for 18 years (95), and that this was his first bad accident (95).

Plaintiff called Mr. Jack L. Stewart of the Willamette Tariff Bureau. He testified (270) over objection (269) as to the margin of profits of motor carriers. He also testified that he knew of no motor carrier who could haul for what Transport Supply was charging (277), 280, 285, 287, 288, 289) to which defendant objected (269, 291). And he testified that Transport Supply could not be making any profit on the runs (278, 282, 285) to which defendant objected (269, 291).

The plaintiff then offered the deposition of Mr. Sim Knight. He testified that he had no previous dealings with Foster (332); that he had been a truck driver since 1946 (330); that he had been in no prior accidents nor received any serious tickets (337). He testified that he contacted Transport Supply when he heard they needed drivers with trucks (339). He stated he went to the San Leandro yard after a telephone conversation with Transport Supply (355-56). He testified that he came up over the Siskiyou Mountains without any trouble (374-5), but that coming down the hill in Tacoma his brakes did not hold (367). Knight did not have a certificate or permit from the Interstate Commerce Commission to make the haul in question.

Plaintiff next offered the desposition of Mr. Edwin Cusick, the manager of the Trucking Division of Bigge Drayage Company. He testified to what he would look for on a vehicle he was leasing (453-56) to which defendant objected (453, 456). He also testi-

fied that the shipper has no control over the driver (466).

Plaintiff next offered the desposition of Mr. Harold Gordon, Regional Manager of Foster. He testified that they made no differentiation between new or old carriers (482); that it was common to receive calls from carriers soliciting business (484), and that they take for granted that the carriers are licensed (488).

Plaintiff next called Mr. Felix Baker. He testified that he made the sale to Traylor-Pamco, but when he could not get his regular carrier, he gave it to Transport Supply (517). He testified he did not ask the rate, only when the rails would be delivered (534).

Plaintiff next offered the deposition of Robert Logan. He testified that the price quoted by a salesman depended on how much profit that salesman wanted to make on that sale (541).

Plaintiff next offered the deposition of Charles Whitacre. He testified that he would inquire about a rate only if his sale had a thin profit (548); that the most important thing about a carrier is whether they can pick up and deliver the material.

Plaintiff next called Mr. Kenneth Beadle, Vice President of Pacific Intermountain Express. He testified that shippers do not tell carriers what kind of equipment to buy, nor what drivers to hire (564).

The retired Regional Manager of the ICC for Idaho, Washington and Oregon, Frank Landsburg, was plaintiff's next witness. He testified about a problem with uncertified motor carriers (643) which he said was common knowledge (646) that led to eco-

nomic dislocation because of price-cutting to which defendant objected (643, 644, 645).

At the conclusion of the seven day trial, the jury brought in their verdict. In answer to specific interrogatories, they found that Foster was negligent in the selection of Transport Supply as an independent contractor for interstate transportation of the cargo of steel, and that this negligence was a proximate cause of the injury complained of (R. 180). In addition, they found that there was no overloading or improper loading of the vehicle. Further, they found that Foster had violated Section 322(c) of the Interstate Commerce Act and this violation was negligence and that this negligence was a proximate cause of the injuries involved (R. 180). The jury found damages for plaintiff Melvin Hurnblad in the amount of $12,500 and damages for plaintiff Grace Hurnblad in the amount of $62,500 (R. 176). The jury also brought in a verdict against defendants Knight and McGowan and a verdict for defendant David Paul's Eastport Dodge (R. 176). The additional defendant Foster then moved for a judgment notwithstanding the verdict and/or in the alternative for a new trial (R. 183). This was denied by the court (R. 188). Additional defendant Foster then filed notice of appeal to this Court (R. 190).

B. Questions Involved

1. Where a shipper contracts to have his goods carried by a carrier who in turn contracts a trucker to do the job, can the shipper be held liable for the negligence of the trucker?

2. Can a shipper be held liable for negligence in em-

ploying an independent contractor when there is no evidence that this independent contractor was incompetent?

3. Where there is no showing of incompetence of an independent contractor at the trial, can it still be said that the shipper should have known he was incompetent?

4. When the shipper's only contact with the trucker was when the trucker pulled his truck into a storage yard operated by another trucking firm, can it be said that the shipper should have known that the trucker was uncertified?

5. When the only bills from the carrier arrived after the shipment in question was on its way, can it be said that the shipper should have known that the rates were below the allowed minimum?

6. Can a plaintiff claim the violation of a statute is negligence *per se* when plaintiff is not within the group to be protected by the statute, and the harm suffered is not that which the statute was intended to remedy?

7. Can violation of a statute, by shipping on an uncertified carrier, be the proximate cause of an accident which was actually caused by the truck driver's negligence in failing to check his brakes while on the road?

8. Is not the admission of repetitive irrevelant testimony concerning the minimum legal rates of certified carriers so erroneous and prejudicial as to be reversable error?

9. Is not the admission of testimony as to what procedure would be followed by an ICC certified carrier when he leases a truck reversable error when the court, in failing to strike the irrelevant testimony instead instructs the jury that they can use it in any way they want?

10. Is not the admission of prejudicial testimony concerning the reputation and activities of the class of uncertified carriers reversable error when the only issue is the reputation and activities of a particular carrier?

11. Can a substantial verdict for plaintiff stand when the court has erroneously instructed on proximate cause?

12. Is it not reversable error to instruct that statutes and regulations, which are applicable only to carriers should be considered in determining a shipper's liability, particularly when the court refuses to instruct that the shipper has no duty to enforce the statutes and regulations?

13. Is it not reversable error to instruct on plaintiff's theories of the case when he has failed to introduce substantial evidence to support any of his theories?

SPECIFICATIONS OF ERRORS

1. The denial of additional defendant's motion to dismiss plaintiff's complaint for insufficieny of the evidence (856-57).

2. The denial of additional defendant's motion for judgment notwithstanding the verdict (R. 183 and 188).

3. The denial of additional defendant's motion for a new trial (R. 183 and 188).

4. The court's charge as to Foster's liability for employment of an independent contractor (889-890) (R. 163, 164).

> In general, no person is liable for the negligent acts of an independent contractor committed in the performance of his contract work. However, one who engaged an independent contractor has the duty to use reasonable care to employ a competent and careful contractor when the work required of such contractor involves a substantial or serious risk of personal injury to third persons unless such work is performed with reasonable skill and care. Failure of Foster Company to use ordinary and reasonable care in selecting a reasonably careful and skillful contractor would constitute negligence and would warrant a recovery by plaintiffs against the defendant Foster Company provided the jury also finds it established by a fair perponderance of the evidence that such negligence proximately caused or proximately contributed to causing the collision in question.
>
> The words "competent and careful contractor" mean a contractor who has available safe and adequate equipment and who possesses the knowledge, skill and experience which a reasonably prudent person in the same or similar circumstances would consider necessary for performance of the contract work without creating an unreasonable and serious risk of injury to the person and property of others.

In determining whether Foster Company em ployees exercised reasonable and ordinary car in engaging as its independent contractor th Transport Supply Company, and the equipmer and driver it might provide, you should conside the care which a reasonable prudent person woul use under the same or similar circumstances, in cluding but not limited to the following factors:

1. The danger to which others will be expose if adequate and safe equipment is not used o the contractor's work is not properly and safel done.

2. The character or nature of the contrac work, that is, whether the work requires onl ordinary competence or is work which can be prop erly done only by special equipment operated b persons possessing some special training, ski and experience.

3. Whether or not the independent contracto selected for carrying the shipment is reasonabl qualified to perform the work without unreasor able and unnecessary risk of injury to othe users of public highways.

to which additional defendants objected (915):

We take exception to the Court's discussion o either of the three grounds of recovery enum erated in the Court's instructions against th Foster Company, and I take it is not necessar for me to spell those out?

THE COURT: No, I have them right here.

MR. MOCERI: For the reason that there i no evidence on either of these three grounds tha either ground was the proximate cause of th accident, and I will not spell that out in detai We have previously presented that to the Cour and I am sure that the Court is fully aware o the contentions that we have been making her

simply to add —

THE COURT: You have continuously contended right from the beginning that the matter of rates, ICC regulations, and the like, and all matters pertaining thereto is not a proper basis for recovery, and there is no evidence to show they were the proximate cause related to the collision in question. So there is no need of repeating that.

MR. MOCERI: With reference to the grounds of negligence and selection of an independent contractor, we would as an additional ground urge with reference to that that there is no evidence that Transport Supply Company, which was the contractor which we engaged, had any equipment deficiency or personnel deficiency or any propensity or deficiency or proclivity, which was a proximate cause or reasonably related to the cause of the accident herein.

5. The refusal of additional defendant's requested instruction No. 23 (R. 60):

You are instructed that there is no evidence that L. B. Foster Company was negligent in the selection of Transport Supply Company as a carrier to deliver the load in question, and that issue is removed from your consideration.

No. 4 (R. 41):

You are instructed that there is no evidence that L. B. Foster Company had any knowledge that Transport Supply Company was not a competent carrier of the goods in question. Therefore, it cannot be held for any incompetence, if any, of Transport Supply Company, nor for any incompetence, if any, of Sim Knight, the trucker engaged by Transport Supply Company.

No. 20 (R. 57):

> You are instructed that L. B. Foster Company had no duty to inspect the braking system of the truck operated by Sim Knight at the time of the accident and that issue is removed from your consideration.

No. 21 (R. 58):

> You are instructed that L. B. Foster Company had no duty to inquire to determine whether Transport Supply Company and/or Sim Knight had complied with the Interstate Commerce Act, or any rules and regulations of the Interstate Commerce Commission and that issue is removed from your consideration.

to which the additional defendant objected (918):

> Those instructions, Your Honor, relate to the same issues of sufficiency of the evidence to create a jury question on proximate cause or on negligence which we have previously discussed, and I will not go into more detail.

6. The refusal of additional defendant's requested instruction No. 9 (R. 46):

> You are instructed that L. B. Foster Company selected Transport Supply Company to haul the load in question. However, there is no evidence of any negligence in the selection of Transport Supply Company.
>
> You are instructed that L. B. Foster Company did not select Sim Knight as carrier of the haul in question, but rather Sim Knight was selected by Transport Supply Company. Therefore, you are instructed that L. B. Foster Company cannot be held responsible for any negligence in the selection of Sim Knight as the trucker of the haul in question.

and the grounds upon which it was urged (919):

We except to the Court's failure to give defendant's requested instruction number 9, Your Honor, and particularly the last sentence where the jury would be advised that L. B. Foster Company cannot be responsible for any negligence in the selection of Sim Knight as the trucker of the haul in question for the reason that we do not participate in that selection, and they might conclude that he was a negligently selected trucker, and this sentence would advise them that we are not responsible for that.

7. The refusal of additional defendant's requested instruction No. 11 (R. 48):

You are instructed that the defendants Sim Knight and L. B. McGowan were independent contractors as far as their relationship to L. B. Foster Company is concerned, and L. B. Foster Company is not liable for any negligence of Sim Knight and L. B. McGowan.

and the grounds upon which it was urged (919):

We except to the failure of the Court to give requested instruction number 11 wherein the jury would be advised that Sim Knight and L. B. McGowan were independent contractors as far as their relationship to L. B. Foster Company is concerned and we cannot be held liable for their negligence.

The Court did instruct the jury that you are not liable for negligence as an independent contractor and does not specifically refer to those two defendants.

8. The admission into evidence of testimony relating to the procedure followed by an ICC licensee when leasing equipment (454):

Q. If a truck at that time would have called at

the Bigge yard to haul for Bigge Drayage without such marking what would have been the position of Bigge Drayage concerning such equipment.

A. Well, there's a ritual that you go through. You physically check the mechanical condition of the equipment. There is a compliance sheet that you have to fill out. The placards have a specific number and they are registered as such and then you check to make sure the driver has had a valid ICC physical, and in our particular case they would have to go on our payroll if they were used for less than 30 days and just follow the full procedures of the safety regulations of the Interstate Commerce Commission.

to which the additional defendant objected (456):

MR. MOCERI: Now, Your Honor, I move this testimony be stricken because it is now clear he was referring to their leasing operation.

THE COURT: The testimony, as the jury will note, apparently refers to an occasion when an ICC permitee leases equipment and perhaps personnel to operate it from someone else. There is no suggestion here that a leasing was involved in this case, but if you find that that procedure described here has some other bearing in another way to the issues in the present case, you may treat it so, otherwise, not.

Of course, you will receive instructions concerning the issues in this case at a later time. Then you may make a determination as to whether or not this is applicable or not, whether it has probative value or not to the issues that you are to consider.

9. The admission into evidence of testimony regarding the reputation of the group of unlicensed

motor carriers (643):

Q. All right. In your experience with the Interstate Commerce Commission did you become aware with a problem involving non-licensed or unregulated highway motor carriers?

A. Yes.

Q. (By Mr. Hulscher) In your experience with the Interstate Commerce Commission and your activities in the safety field, did you become aware of a problem involving unlicensed or unregulated highway motor carriers?

A. Yes sir. It was necessary for us to work with that problem consistently.

Q. (By Mr. Hulscher) In the year 1963, sir, was there a general reputation in the industry among carriers — highway carriers, shippers, and regulatory agencies concerning certified or unregulated carriers operating in interstate commerce?

A. Yes, sir.

to which the defendant objected (643):

MR. RUTHERFORD: I would object, Your Honor, to testimony on that point because proof of what some other group or people do is no proof of what another does at a specific time and place.

THE COURT: I think in view of the jurisdiction of the office of which Mr. Landsburg was in charge and the particular question now put, you may certainly answer that at a minimum. Go ahead.

(page 644):

MR. RUTHERFORD: Here again I would object.

THE COURT: First of all, I think you better

state with what the problem was, then we will decide from there.

MR. RUTHERFORD: I would object on the grounds of relevancy.

THE COURT: I think not. I think it is relevant.

MR. RUTHERFORD: Any law enforcement agency has problems, and that doesn't mean that some specific individual —

THE COURT: I can't tell what he is talking about until he states what the problem is, and when he states that, we will consider it in the light of that.

You may state what the problem was, Mr. Landsburg, please.

MR. HULSCHER: May I withdraw that question and ask another so that we can lay a proper foundation?

THE COURT: Yes, you may.

(Page 645)

MR. RUTHERFORD: It is necessary for me to reiterate my objection to this last question?

THE COURT: No, it is not. The same objection will be applicable wherever appropriate to the text.

MR. MOCERI: I might say the question is different. He is talking about reputation rather than a problem, and I guess he is going to try and prove a reputation of one person by the reputation of a class, which is not proper.

THE COURT: The word "reputation" is a little questionable in that context. Would you please clarify what you mean by that?

MR. HULSCHER: For the record, Your Honor, I am not offering reputation to prove the

truth or falsity of the reputation. I am offering the reputation to prove the knowledge of shippers in the industry.

THE COURT: I understand that. The only difficulty from my point of view is that I think there would be a better word to use rather than "reputation."

to which additional defendant objected further (856):

We would further move that the testimony of the witness Mr. Landsburg, who was from the Interstate Commerce Commission, a former representative of the ICC, be stricken from the record for the reason that it is improper to show the propensities or characteristics of a person of a class specifically and simply by testifying to the general characteristics of a class of which that person is a member. This being a tort action, we would contend that the plaintiff has to prove the characteristics or propensities of this carrier by —of which there is no evidence that this carrier and Transport Supply Company had any defective equipment or had a reputation for having incompetent drivers or inability to not maintain their equipment, and we, therefore, move the testimony relating to the negligence selection of Transport Supply Company be stricken and that issue be withdrawn from the jury's consideration.

10. The Court's charge as to Foster's liability for violation of Section 322(c) (888) (R. 166-167):

The third ground of recovery asserted by plaintiffs against the defendant Foster Company is based on a violation of the Federal Interstate Commerce Act. This law of the United States provides it shall be unlawful for:

"any shipper, or any officer or employee thereof [to] knowingly accept or receive any [rate] concession in violation of any provision of the

[Interstate Commission Act]."

For convenience, this section of the law will be referred to as "Section 322."

One of the purposes of the Interstate Commerce Act and of Section 322 is to regulate and supervise vehicles engaged in interstate commerce on public highways and to provide for the safety of such vehicles and all users of public highways. To this end, Congress has provided that no person shall engage in any for-hire transportation by motor vehicle in interstate commerce on any public highway "unless there is in force with respect to such person a certificate or a permit issued by the [Interstate Commerce] Commission authorizing such transportation."

Under the evidence it is an undisputed fact that defendant Sim Knight was not a driver authorized to transport commodities in interstate commerce under a certificate or permit of the Interstate Commerce Commission at the time he performed the interstate transportation of the load of steel in question.

If you find it has been established by a fair preponderance of the evidence that employees of Foster Company at or prior to the time the cargo of steel in question was loaded at San Leandro, California for interstate shipment to the State of Washington knew, or in the exercise of reasonable care should have known:

1. That the defendant Knight did not hold a valid certificate or permit issued by the Interstate Commerce Commission authorizing Knight or his vehicle to perform interstate transportation of the shipment, and

2. That the amount of charges by Transport Supply Company to Foster Company for such interstate transportation was less than the minimum rate Foster Company would have been re-

quired to pay for such transportation by a carrier, which was certified by the Interstate Commerce Commission, then you may find that Foster Company, as a shipper, violated the above stated provision of Federal Law, Section 322, and such violation, if you find it occurred, would constitute negligence as a matter of law.

As previously stated, however, a violation of Section 322 and consequent negligence of Foster Company in that particular standing alone is not sufficient to find Defendant Foster Company liable to the plaintiff. It must be also shown by a fair preponderance of the evidence that the violation of Section 322 by Foster Company proximately caused or contributed to causing the collision involved in this case.

to which additional defendant objected as to the giving (915):

MR. MOCERI: For the reason that there is no evidence on either of these three grounds that either ground was the proximate cause of the accident, and I will not spell that out in detail. We have previously presented that to the Court, and I am sure that the Court is fully aware of the contentions that we have been making here simply to add —

THE COURT: You have continuously contended right from the beginning that the matter of rates, ICC regulations, and the like, and all matters pertaining thereto is not a proper basis for recovery, and there is no evidence to show they were the proximate cause related to the collision in question. So there is no need of repeating that.

and as to the form (917):

Now, further with reference to the third ground of recovery, we take exception to the

portion of the Court's instruction wherein the Court advises the jury as follows, "If you find," and I am now quoting from the last paragraph, "if you find that established by a fair preponderance of the evidence that employees of Foster Company at or prior to the time the cargo of steel in question was loaded at San Leandro, California for interstate shipment to the State of Washington knew, or in the exercise of reasonable care should have known," we take exception to the "or in the exercise of reasonable care should have known."

That instruction advises the jury that there can be a violation of this statute without actual knowledge but only if they should have known, and we submit that to violate this statute, the "knowingly" means that knowingly and that it has to be based on actual knowledge and it has to be based on a finding of actual knowledge, which, of course, can be gathered from all the circumstances but it cannot be based on a finding that they should have known, and we submit that this is an erroneous interpretation of the statute.

11. The refusal of additional defendant's requested instruction No. 8 (R. 45):

> You are instructed that the duty to enforce the Interstate Commerce Act pertaining to motor carriers and the rules and regulations of the Interstate Commerce Commission is that of the Interstate Commerce Commission and not upon a shipper such as L. B. Foster Company, Inc.

and the grounds upon which it was urged (919):

> We except to the Court's failure to give instruction number 8 wherein the jury would have been instructed the defendant L. B. Foster Company had no duty to enforce the provisions of

the Interstate Commerce Act and provisions of the rules and regulations thereby. We feel this is particularly significant in light of the Court's instructions advising the jury they may consider these rules and statutes and regulations as against this defendant.

12. The refusal of additional defendant's requested instruction No. 17 (R.54):

You are instructed that whether Transport Supply Company charged L. B. Foster Company a lawful rate for the haul in question, was not a proximate cause of the accident and that issue is removed from your consideration.

No. 18 (R. 55):

You are instructed that whether Transport Supply and/or Sim Knight were licensed by the Interstate Commerce Commission was not a proximate cause of the accident and that issue is removed from your consideration.

No. 19 (R. 56):

You are instructed that L. B. Foster Company had no duty to inquire as to what rate would be charged by Transport Supply Company for the load in question and that issue is removed from your consideration.

No. 22 (R. 59):

You are instructed that L. B. Foster Company had not duty to inquire as to whether Transport Supply Company and /or Sim Knight were licensed by the Interstate Commerce Commission to haul the load in question.

13. Charge of the Court as to proximate cause (875-876) (R. 153):

> The term "proximate cause" means that cause which in a direct, unbroken sequence produces the injuries complained of and without which the injuries would not have occurred. One chargeable with negligence is liable for injury which was reasonably foreseeable in the exercise of reasonable care, whether or not such consequence of a negligent act or ommission actually was foreseen by the negligent party. If a particular negligent act or omission initiates a series or chain of causation, in which each connecting causative factor is proximately caused by the preceding factor and in turn proximately causes a succeeding factor, and the unbroken sequence finally causes injury or damage, such end result, in law, is chargeable to the negligence which initiated the series or chain or causation.

and the grounds of the objection were (913-14):

> MR. MOCERI: Your Honor, comes now the defendant L. B. Foster Company and excepts to the Court's instructions as follows, first we except to that portion of the Court's instruction on proximate cause reading as follows: [here counsel quoted the Court's instructions as above] for the reason that that statement of the law upon proximate cause goes beyond the concept of proximate cause. The first two sentences of the Court's definition does contain the concept of proximate cause, which includes the concept of foreseeability.
>
> However, the sentence that I have just referred to goes beyond the concept of foreseeability and relies strictly on cause and effect or what is referred to as the "but for" doctrine, which is not the concept of proximate cause.

14. The admission of testimony as to the lawful rate (20):

Q. Now, were you aware of anyone at the time these shipments were made that could have lawfully hauled the commodity in question for the rate stated on the Transport Supply invoice?

MR. MOCERI: Object, Your Honor —

MR. RUTHERFORD: Object to the form of the question, asking the witness to comment on the law.

THE COURT: Well, if I understand it correctly, it is with their common carriers, the regulated common carriers available for the carriage of this shipment from the point indicated, is that what you are asking?

MR. HULSCHER: At the 90 cent rate, Your Honor.

THE WITNESS: Not of my knowdelge.

And with another witness (272):

Q. Are you aware of any motor carrier in the industry anywhere, including California, Orefon, and Washington that could have lawfully hauled the commodities there for the rate charged by Transport Supply Company?

A. I cannot, sir.

to which defendants objected:

MR. MOCERI: I would make the same objection previously made as to what I anticipate the entire line of inquiry of this witness will be and on the additional grounds that it is repetitious, covering the same ground that another witness previously covered.

15. The admission of testimony as to the minimum rate that would have been charged by carriers which

were members of the Pacific Inland Tariff Bureau (17):

Q. Now sir, would you tell us what the minimum rate would have been for that haul for those carriers you represent?

MR. MOCERI: I object to this line of inquiry, Your Honor, on the grounds that it is irrelevant and immaterial on the issue of proximate cause of the accident between Sim Knight and the plaintiffs.

THE COURT: That contention will be deemed as a continuing contention, and when all of the evidence applicable to that position is before us, I will then rule on it. For now I will admit it, subject, however, to later being stricken.

Ladies and gentlemen, whether this particular phase of the case will become an issue for you to consider will be determined at a later date. In other words, the evidence is now admitted pertaining to this subject matter tentatively, that is, to a determination by the Court after all the evidence pertaining to this issue is presented, whether or not it is sufficient to raise a question for the jury to consider.

Go ahead.

MR. MOCERI: I had another ground here I might state.

THE COURT: Go ahead.

MR. MOCERI: The additional grounds that I had here is that, and I am assuming that counsel is going to go ahead with A through D, is that the dates of these invoices are all after the date of the shipment here, and we would object on the additional grounds without showing any prior knowledge on the part of L. B. Foster Company.

THE COURT: That would be another objection final ruling on which will be made when we

have the whole matter laid before us.

MR. RUTHERFORD: The defendants Knight and McGowan also join in the objection on the grounds of relevancy. We don't feel it has any bearing.

THE COURT: I might say now, to save time of duplicitious objections, that as far as I'm concerned, if it is agreeable with counsel for the plaintiff and you gentlemen for the defendant, that any objection voiced by the defendant may be deemed as having been joined in by any other defendant to whom the objection would be applicable. That will mean that you will not need to object. On the other hand, if you feel so incensed that you would like to let off a little steam or state some additional ground or the like, of course, you are free to do that.

All right. Go ahead.

Q. All right. Now, will you tell us, sir, what the minimum rate would have been for those carriers which you represent for this haul?

A. The ICC filed motor carrier tariffs at this date in question was $3.56 per 100 pounds, LTL, which means less than truckload, which also means would apply on any quantity which is less than a particular stated weight, such as 10,000 pounds. This was reflected in 22 Revised page 330 of Pacific Inland Tariff Bureau, number 9-C bearing an effective date of November 23, 1963.

To which there was the further objection (854):

First of all, Your Honor, relating to the exhibits which relate to rates that were charged by Transport Supply Company to L. B. Foster Company and all of the testimony on the rates that were charged by Transport Supply Company to L. B. Foster Company, we move those exhibits

and that testimony be stricken from the record for the reason that it would not be a proximate cause of the accident herein.

16. Charge of the Court which stated that the statutes and regulations which by their terms affect only motor carriers could be applied to a shipper (880).

The Court instructed the jury on inspection and maintenance requirements of motor carriers, on equipment requirements for vehicles, on standards for motor vehicle operators, on maximum speed limits, and on traffic control signals. After quoting statutes and regulations in detail for two pages (R. 157-158) the Court advised the jury as follows (R. 159):

> As previously stated, all of the foregoing statutes and regulations are specifically applicable only to owners and operators of motor vehicles, and violations thereof by defendants Knight and McGowan would constitute negligence on their part as a matter of law.
>
> *However, the safety standards prescribed by such laws* and *regulations may be considered by the jury along with all other circumstances shown by the evidence in determining whether either defendant Foster Company or defendant Eastport Dodge was negligent in failing to exercise reasonable care in any particular alleged against them,* and *of so, whether such negligence was a proximate cause of injury or damage to the plaintiffs.* (Italics added)

to which the additional defendant objected (914-915):

> Second, Your Honor, we will except to that portion of the Court's instruction as follows, this Court's instruction on Sim Knight and McGowan

after the Court quoted these statute and regulations and the Court gave this instruction to which we now except. [Here the additional defendant quoted the italisized portion of the charge set forth above].

We except to that instruction, Your Honor, for the reason that it advised the jury that these regulations, which on their face apply only to motor carriers, may be deemed applicable to the L. B. Foster Company, and which on their face are not applicable, that it does create a misleading inference as to the applicability of these statutes and instructions to the Foster Company.

SUMMARY OF ARGUMENT

The prime issue presented for determination here is whether a principal can be charged with the negligence of an independent contractor. In this case it is not the independent contractor with whom the principal dealt, but rather another sub-contractor who contracted with the independent contractor. A determination that vicarious liability cannot extend through two independent contracts ends consideration of the case without need to delve into the particular circumstances.

Another issue raised is whether a plaintiff can proceed to the jury on his theory that defendant selected an incompetent independent contractor when plaintiff fails to introduce any evidence of any sort of antecedent activity by the independent contractor which would indicate incompetence.

Another portion of the argument deals with the question of proving negligence and proximate cause based on the violation of statute. The first issue raised

is what minimum amount of evidence must plaintiff introduce when the criminal statute requires a knowing violation. Then, too, can plaintiffs claim benefit of a statute which was not enacted for their benefit nor designed to remedy the harm they sustained? Finally, the issue of what causal connection exists between a shipper shipping on an uncertified carrier and injuries sustained because of an accident resulting from the driver's negligence is discussed.

The last portion of the argument deals with the reasons for which appellants claim the right to a new trial. These relate to (1) admission of irrelevant, prejudical testimony about "bloody accidents" left by uncertified carriers, (2) admission of irrelevant, confusing testimony about "lawful rates", (3) admission of irrelevant and misleading testimony about what a certified carrier would look for in a trucker, (4) a charge which allows the jury to apply motor carrier statutes and regulations to a shipper, and (5) a charge which sets forth an incorrect definition of proximate cause. Although appellants believe that each of the reasons warrants a new trial, the court is also to consider the cumulative effect of the various reasons.

ARGUMENT

I. A PARTY INJURED BY THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR, WHO HAD A CONTRACT WITH ANOTHER INDEPENDENT CONTRACTOR, WHO HAD A PREVIOUS CONTRACT WITH A THIRD INDEPENDENT CONTRACTOR, HAS NO CLAIM AGAINST THE THIRD INDEPENDENT CONTRACTOR FOR THE NEGLIGENCE OF THE FIRST INDEPENDENT CONTRACTOR

This is the novel question which this case presents. Here the plaintiffs, who were injured in a truck-auto collision, which collision was proximately caused by the negligence of the driver of the truck in failing to properly inspect and repair the truck, sought to obtain recovery not only against the owners and driver of the truck, the dealer who sold them the truck, the carrier with whom the driver contracted to haul, but even the shipper whose goods the driver was delivering.

Transport Supply was an independent contractor with respect to Foster and the jury was so instructed (R. 164). In addition, Knight was an independent contractor in respect to Transport Supply. Knight owned his own truck (333), was self-employed in the trucking business for a number of years (341), did not have a continuing relationship with Transport Supply (339, 355) and was paid not by the hour but by the weight to haul the shakes to California (362). No specific price had been agreed upon for the hauling of the steel rails in question (362). It was never contended at the trial that Knight was not an independent contractor in his relationship with Transport Supply. Under the law of the State of Washington this was clearly the relationship. See *Hollingbery vs. Dunn,* 68 Wn.2d 75, 411 P.2d 431 (1966).

Thus, the question presented by this appeal is can a party injured by the negligent operation of a truck, recover from a third party whose only connection with the accident was that he contracted with an independent contractor (Transport Supply) to have goods delivered to a buyer, and the independent contractor (Transport Supply) in turn contracted with another independent contractor (Knight) to deliver

the goods, which independent contractor picked up the goods and whose subsequent negligence caused the injury. The effort which must be made to get this contention into any kind of understandable grammatical form reveals the significant lack of legal underpinning from which the contention suffers. The hornbooks, the annotations, and the digests are legion with the cases wherein a principal is held not liable for the actions of an independent contractor. Moreover, exhaustive research reveals no case wherein a principal was held liable for the negligent acts of his independent contractor's own independent contractor.

One case in which this untenable proposition was advanced was *DeMichiel v. General Crushed Stone Co.,* 218 F.2d 186 (3 Cir. 1954). The injured party sued the driver and the owner of the truck which injured him. He also sued the alleged principal, the general contractor on the job. The district court granted the general contractor's motion for a judgement N.O.V. The plaintiff appealed. The court affirmed holding that the stone company which subcontracted supplying of stone to another independent contractor who, in turn, contracted with an independent trucker for hauling of stone, was not liable to the person injured due to the negligence of the trucker hired by such independent contractor. The court said that since there was no question from the evidence that the general contractor was at least two independant contractors removed from the individual who was negligent, there was no theory of law under which the jury could find responsibility.

So it is too here. Foster, by its salesman Barker,

made a contract with Transport Supply (517) to have the steel rails delivered to Seattle. Transport Supply then in turn made a contract with the trucker Knight (355) to pick up and deliver the rails. Knight picked up the rails at the San Leandro yard of Bigge Drayage (360) and proceeded toward Seattle. Sometime later while he was on the road he failed to check or failed to properly repair his brakes. This negligence resulted in the truck losing its brakes in Tacoma. This was two days and 800 miles from any contact with Foster. The negligent acts of Knight which caused the harm are too remote in time, space and contractual relationship from Foster to result in any liability to Foster. Thus, the trial court erred in not dismissing Foster as a defendant at the end of the case (856), and in not granting Foster's motion for a judgment notwithstanding the verdict (R. 183 and 188).

II. THE EVIDENCE FAILED TO ESTABLISH ANY NEGLIGENCE IN FOSTER'S CONTRACTING WITH TRANSPORT SUPPLY.

A. No showing of incompetence of Transport Supply.

The jury found that Foster was negligent in selecting Transport Supply as an independent contractor for transportation of the shipment of steel in qusetion. The jury further found that this negligence was a proximate cause of the injury to the plaintiff. Neither finding is supported by the evidence.

The general rule has always been that an employer is not liable for the torts of those with whom he contracts.

This was stated categorically in the case of *Bill v. Gattavara,* 24 Wn.2d 819, 837, 167 P.2d 434 (1946)

> Although in some early cases it was thought that the doctrine of *respondeat superior* applied to the relation between an employer and an independent contractor, the authority of these few cases was soon overwhelmed by many decisions promulgating the general rule *that an employer is not liable for the torts of an independent contractor or the latter's servants.* This rule of non-liability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed *as to the details of the stipulated work;* and it is therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor.
>
> (Court's emphasis)

See also *Kirk v. United States,* 270 F.2d 110, 116 (9th Cir. 1959) wherein this court referred to this proposition as "the generally applied and well-established rule that a contractee is generally not liable for the torts of an independent contractor or of the latter's servants."

A generally accepted exception to this rule has been carved out. This exception imposes liability on the employer for the harm proximately resulting from failure to select a competent independent contractor. See Prosser, *Torts,* p. 481 (3rd ed. 1964); annotation 8 A.L.R.2d 267 (1949).

The Washington Supreme Court has dealt with the question of the incompetency of a given employee or

contractor on many occasions. The first case to deal squarely with this problem was *Richardson v. Carbon Hill Coal* Co., 6 Wash. 52, 32 Pac. 1012 (1893). This was an action by an employee against an employer for injuries sustained in a mine and for subsequent negligent treatment from the doctor provided by the company. In the course of its discussion, the court (pp. 56, 57) draws a clear distinction between the doctor being negligent and being incompetent. As to the first, the court points out the evidence which shows how the treatment of this plaintiff-patient was negligent. They then turn to the testimony concerning the doctor's competency. They conclude that it shows he was "grossly incompetent; that is, he was habitually very seriously under the influence of liquor, so as to render him unfit for duty." This case is important not only because it gives an example of incompetency, but because it points out the distinction that must be kept in mind throughout the entire consideration of this case: That is, the distinction between the words "incompetent" and "negligent". In this case, the court clearly shows that negligence refers to the particular act which gave rise to this particular lawsuit; whereas competency or incompetency refers to the characteristics displayed by the individual antecedent to the act involved.

As the Alabama Supreme Court stated succinctly in discussing this problem:

> Negligence is not synonymous with incompetence. The most competent may be negligent. But one who is habitually negligent may on that account be incompetent.

McGorwin v. Howard, 251 Ala. 204, 36 So.2d 323, 325 (1948).

More light on the problem has been shed by a Washington case of *Green v. Western America Co.*, 30 Wash. 87, 70 Pac. 310 (1902).

This was an action brought by a coal miner against the owner of the mine. One of the allegations alleged negligence on the part of the mine owner in the employment of an incompetent pit boss. The court stated (page 115):

> The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetence, and bringing them home to the knowledge of the master or company; or by showing them to be of such a nature, character and frequency that the master in the exercise of due care must have had them brought to his attention.

The court went on to say that it could only be after repeated acts of incompetency by a servant that any question could arise as to the master's knowledge. This case brings out sharply and distinctly the existence of a presumption in favor of the appellant Foster in this case. This presumption places the burden firmly on the plaintiff to come forward with a significant amount of proof in order to overcome this presumption of due care on the part of the principal.

In a number of subsequent cases the Washington Court has adhered to these principles in handling the problem in question: *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273 (1905), (where the court ruled that two acts of negligence did not establish incompetence); *Johansen v. Pioneer Mining*

Co., 70 Wash. 421, 137 Pac. 1019 (1914), (where testimony of several specific acts of negligence together with a reputation for incompetence of the foreman hired by the defendant was held sufficient to create a jury question); *Miller v. Mohr,* 198 Wash. 619, 89 P.2d 807 (1939), where the court ruled that even if the evidence showed that the employee in question was incompetent, that the matter had no bearing upon the defendant's responsibility unless "in some manner the information had been brought home to appellant[defendant] prior to the accident" (p. 642).

In the case of *Simon v. Hamilton Logging Co.,* 76 Wash. 370, 136 Pac. 361 (1913) the plaintiff atempted to prove that the doctor contracted for by his employer was incompetent, and for this the principal should be liable. He first offered to prove an instance of alleged malpractice occurring six years before the trial. This was refused as being too remote. Plaintiff then attempted to introduce events which occurred after the case arose. These were also refused. The court stated the rule it was applying in this language.

> While incompetency cannot, as a rule, be shown by proof of a single act of negligence, it is proper to show repeated acts of carelessness and incompetency . . . as touching the question whether the employer knew or might have known that the servant was incompetent if he had exercised ordinary care in his selection or retention. *(Simon,* supra at page 373)

Further, the court stated the rule (page 374-5):

> Specific acts of negligence brought home to a defendant, and reputation, are evidence of the same quality, and an employer cannot be bound unless there is knowledge, express or implied, at a time, when, if acted upon, he could have re-

> fused to employ, or, having him employed, discharged the employee so as to prevent the injury.

Here again the court is pointing out the burden which the plaintiff must bear. He must show acts of carelessness and incompetency, antecedent to the event giving rise to the action, and he must prove that these acts could have been brought home to the employer; or he must at least prove that the individual involved had a repuatation for incompetency or carelessness and that this reputation of this individual was brought home to the party to be charged. The plaintiff herein has failed to supply the record with even one instance of a specific act of negligence by Transport Supply. Further, the record is equally lacking any testimony or evidence as to the reputation possessed by Transport Supply.

While there was evidence that Knight was not licensed by the Interstate Commerce Commission for the haul in question, there was no evidence concerning whether Transport Supply had the necessary licenses and permits. However, even assuming that Transport Supply was not properly licensed to engage in an interstate haul, this does not constitute evidence of incompetency. This precise problem was before the Texas Court of Civil Appeals in *Moore v. Roberts,* 93 SW2d 236 (Tex. Civ. App. 1936).

There the plaintiff was injured when struck by a truck owned by an independent contractor who had been hired by the defendant to haul lumber and driven by an employee of the independent contractor. There was a directed verdict for defendant and on appeal plaintiff claimed that it was error to direct a verdict against him for there was an issue of fact

as to whether defendant was negligent in selecting his independent contractor. The allegation of negligence was based on the contention that the driver of the truck owned by the independent contractor did not have a chauffeur's license and that neither the driver nor the independent contractor had a permit from the Texas Railroad Commission to haul as a common carrier. In addition, the truck was a 1929 model Chevrolet and evidence was introduced raising the inference that the brakes were not in proper repair at the time of the accident. The court rejected all of these contentions saying that the defendant had the right in absence of any notice to the contrary "to assume that Nicholson [the independent contractor] was not conducting his business in violation of the law." Further, the court stated:

> Reasonable diligence would not require Crews [the employer] to see that Nicholson [the independent contractor] had a new truck, nor to have made an examination to determine if the brakes were in proper mechancial condition, and to see that they remained in such condition throughout the performance of the contract. Assuming that evidence is sufficient to warrant a finding that the brakes were out of repair at the time of the accident, and that Nicholson was negligent in this particular, we do not think such fact would convict him generally of being an incompetent contractor. If the contractor is not an incompetent contractor, the degree of care exercised by the employer in his selection is immaterial. (page 239)

A recent case which dealt with the question of liability of the principal for the employment of an incompetent independent contractor was *Mooney vs. Stainless, Inc.,* 338 F.2d 127, (6th Cir. 1964 *cert. den.* 381 U.S. 925). Here the widow sought recovery

against the prime contractor for the negligence of a subcontractor. She alleged that the principal selected an incompetent independent contractor. The trial court entered judgment for the widow. The Sixth Circuit Court of Appeals reversed, and ordered the suit dismissed. The trial court had instructed that the burden was on the plaintiff to prove the defendant guilty of negligence in the selection of an independent contractor. The appellate court approved this and then reviewed what evidence plaintiff had introduced. She had shown that the independent contractor had previously been an empolyee for some years, that his bid was substantially lower than the others, that his equipment was not as comprehensive as it might have been, and that he was engaged by long distance telephone. The court did not find this too persuasive. It stated (page 132):

> Neither was it shown that Wood [independent contractor] had ever before, either as employee or as contractor, been involved in an accident. There is no showing of anything about the previous history of Wood that would have put Stainless [principal] on notice of any incompetence or unfitness on his part, no matter how complete an investigation might have been made by Stainless in advance of engaging him. Though there is an intimation that Wood's equipment was not as extensive as might have been desirable, no evidence was offered by plaintiff as to what extent he was ill-equipped or under-equipped, or as to what minimum equipment it required in the performance of this type of contract.

The court then announced that they were of the opinion that plaintiff had failed to carry her burden of proof and that there was not sufficient evidence of Wood's alleged incompetence to submit to the jury

the question of whether Stainless was negligent in selecting him. For this proposition they cited *Moore,* supra. On a petition for rehearing the court restated its views. In order to avoid any misunderstanding the court stated, (page 136):

> We held that the burden of proof was upon plaintiff to establish that Stainless was negligent in engaging Wood as an independent contractor, rather than upon Stainless to establish that it exercised due care in selecting Wood as the independent contractor. We then proceeded to hold not only that plaintiff failed to carry her burden of proof, but that there was no evidence whatsoever which could have supported a verdict of the jury on this theory, and that the district court therefore erred in submitting plaintiff's second theory to the jury.

~~Turning to plaintiff's case and the testimony contained therein, the following references are all that plaintiff introduced concerning Transport Supply.~~

Turning to plaintiff's case and the testimony presented therein, these were the only references made by plaintiff's witnesses concerning Transport Supply.

1. From the deposition of defendant Sim Knight (338). He testified that Mr Onthanks of Transport Supply had arranged for him to haul a load of shakes from Portland to Sacramento. He had been put in contact with Transport Supply when he was looking for a hauling job. When he had delivered the shakes, Mr. Onthanks told him to pick up the load of steel rails at the San Leandro yard of Bigge Drayage.

2. From the deposition of Edwin Cusick (449). He testified he had never heard of Transport Supply

prior to the trial.

3. From the deposition of Harold R. Gordon (489). He testified that he did not remember dealing with Transport Supply nor did he remember anything about them.

4. From the testimony of Felix Baker (517). He testified he had arranged for Transport Supply to haul the load of steel rails after they called him looking for business. He also testified he had used them once before.

5. From the deposition of Charles Whitacre (546). He testified he had no knowledge whatsoever about Transport Supply.

Plaintiff had the opportunity with Mr. James Connor of the Pacific Inland Tariff Bureau of Seattle (10-58) to inquire as to his knowledge of specific acts of negligence or reputation for incompetence on the part of Transport Supply. He did not do so.

Plaintiff again had the opportunity with Mr. James F. Johnston (101-157). He was sales representative for Pacific Intermountain Express, and knowledgeable of trucking activity in the northwest. Plaintiff did not ask him anything about Transport Supply.

Likewise with Mr. Jack L. Stewart (267-324), whose Willamette Tariff Bureau was based in the same town as Transport Supply, plaintiff did not inquire about Transport Supply's acts or reputation.

He also failed to inquire of Mr. Kenneth Beadle (552-576), a Vice President of Pacific Intermountain Express, as to what the reputation of Transport Supply was.

Finally, Plaintiff had the opportunity with Mr. Frank Landsburg (640-666), retired Regional Manager of the Northwest District of the Interstate Commerce Commission to inquire about Transport Supply's reputation. In all of Mr. Landsburg's testimony, over objection (643-645), concerning the reputation of the class of uncertified carriers, he in no way referred to Transport Supply.

In consideration of the record as a whole, there is simply no evidence to be found anywhere to show either specific acts of negligence or a reputation for negligence on the part of Transport Supply Company. Therefore, without even a scintilla of evidence, much less substantial evidence, to support the conclusion that the independent contractor was incompetent, the jury's finding of negligence cannot be supported by the record.

B. NO SHOWING THAT FOSTER KNEW OR SHOULD HAVE KNOWN THAT TRANSPORT SUPPLY WAS INCOMPETENT.

This proposition follows immediately from the above argument. If the plaintiff was unable to produce any evidence to show to Foster at the trial that they had in fact contracted with an incompetent, how much less could Foster be expected to know this when in the real world it did not have the benefit of an interested adversary digging up every possible fact. If plaintiff was unable to show even a scintilla of evidence which could give rise to an inference of antecedent negligence or carelessness in this fact-finding procedure termed a trial, how could it be possibly be required that Foster should have acquired this nonexistent knowledge elsewhere.

It would be futile to prolong the discussion by assuming arguendo that Transport Supply did demonstarte specific signs of antecedent negligence or possessed a reputation for carelessness. For the next question that must be raised then is was Foster aware or should Foster have been aware of these. The discussion leads nowhere for without specific examples an analysis cannot be made as to whether under the circumstances Foster should have been aware. It is impossible to discuss what Foster knew, or should have known, when there was nothing for them to know.

C. THE HARM MUST BE CAUSED FROM THE QUALITY IN THE CONTRACTOR WHICH MADE IT NEGLIGENT FOR THE EMPLOYER TO ENTRUST THE WORK TO HIM.

The Court's instruction on this issue (R. 163) was based on the Restatement of Torts 2d, Sec. 411. The reporter's comment on the extent of the rule under comment b is as follows:

> The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physicial harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him. Thus, if the incompetence of the contractor consists in his lack of skill and experience or of adequate equipment but not in any previous lack of attention or diligence in applying such experience and skill or using such

> equipment as he possesses, the employer is subject to liability for any harm caused by the contractor's lack of skill, experience, or equipment, but not for any harm caused solely by the contractor's inattention or negligence.

An application of this rule is found in *Mooney v. Stainless, Inc.,* 338 F.2d 127, cited, *supra,* at page 39 The court stated that there was no evidence that the independent contractor was incompetent and, therefore, the defendant could not be negligent in selecting him. The court went on, however, and stated that they were not at all certain that Stainless would have been liable even if Wood had been shown to be incompetent. They quoted section 411 of the Restatement of Torts and quoted comment b therein. They took cognizance of the fact that in their case plaintiff attempted to prove the independent contractor's incompetence by reason of his alleged lack of equipment and lack of experience. They then took note of the accident and stated that the death of plaintiff's husband seemed to have been caused more by lack of attention or temporary negligence on the part of the independent contractor in operating the truck rather than by lack of experience as a contractor or by any insufficient equipment. Thus, the court concluded that Stainless would not have been liable for this particular accident even if it were shown that the subcontractor had been incompetent since the accident occurred as a result not of his incompetence, but rather temporary lack of attention or negligence.

III. THE EVIDENCE FAILED TO ESTABLISH ANY NEGLIGENCE BY FOSTER REGARDING SECTION 322(c) WHICH WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURY,

The jury found in answer to a special interrogatory

that Foster was negligent in violating Section 322(c) of the Interstate Commerce Act. (49 U.S.C. Sec. 322 (c)). And, that this negligence was a proximate cause of the accident (R. 180). The Court stated the law to be (R. 166):

> This law of the United States provides it shall be unlawful for: 'any shipper, or any officer or employee thereof, [to] knowingly except or receive any [rate] concession in violation of any provision of [the Interstate Commerce Act].

At the very least, the statute requires a knowing party, and more probably in addition a willing party, in order to have a violation. Thus there must be substantial evidence, no mere scintilla, of Foster's knowledge of this violation. (See *Ross v. Great Northern RR,* 315 F.2d 51 (9th Cir. 1963). The Court instructed the jury (R. 166) that if Foster knew, or *should have known* that (1) Knight was not authorized by the ICC to perform the interstate shipment and (2) that Transport Supply was charging them less than that which would have been charged by an ICC certified carrier, then they could find that Foster violated § 322(c).

A. THE RECORD SHOWS NO VIOLATION OF THE ACT.

1. NO SHOWING THAT FOSTER KNEW OR SHOULD HAVE KNOWN THAT KNIGHT HAD NO CERTIFICATE.

Since it is unquestioned that Knight did not have a certificate there is no question about plaintiff having sustained this portion of his burden of proof. However, the evidence of plaintiff does not show that Foster knew that Knight did not have a certificate

nor does it show that he should have known this.

A review of the record reveals only one occasion when Knight came in contact with Foster. This was at the San Leandro yard of Bigge Drayage when the shipment in question was loaded (360). Knight drove in and announced that he was to take a load of steel rails to Seattle. It was not even shown by the plaintiff that Knight at this point had any contact with Foster. Since Bigge Drayage employees did the loading (474), it was not essential that the Foster watchman or clerk be in constant attendance (475). However, assuming that the employees were in attendance, what was there to put them on notice. They were not instructed to look for markings (485). Even if they were, this would not get them very far for as Mr. Baker testified (674), many carriers have a city truck which picks up from the yards and then returns to the carrier's own yard for staging.

However, the question must come back to what did plaintiff show that would indicate that Foster should have known. He brought in Mr. Edwin Cusick, the manager of Bigge Drayage Trucking Division who testified (454) as to what he would look for on any truck he was renting pursuant to his Interstate Commerce Commission Certificate. But Mr. Cusick was not a seller-shipper whose main purpose is to get the load on the truck as fast as possible and get it on the way to the buyer. Also, Foster did not rent this vehicle — it was loading it. Mr. Cusick's testimony was irrelevant to any issue in the case, and certainly could not qualify as giving any sort of inference into what the reaction of a reasonably prudent shipper would be.

In short, there is no evidence in the record that any reasonably prudent shipper would run out and check each vehicle of each carrier it uses to determine whether its Interstate Commerce Commission numbers are on prominent display or whether, if numbers are displayed, that they are real.

Since the findings required to be made by the jury were stated in the conjunctive (R. 166-7), failure to prove the first by substantial evidence eliminates any necessity to consider the second. Plaintiff herein failed to present anything approaching a substantial amount of evidence by which it could be inferred that a reasonable prudent shipper would make a point of checking a carrier's truck for anything other than proper size. There is not one item of evidence in the record to show that any shipper anywhere at any time felt that this was his duty. The duty of ferretting out uncertified carriers lies with the Interstate Commerce Commission. It is their job and their responsibility to eliminate the violators of the law. This case notwithstanding, they have done their job well. The testimony of Harold R. Gordon, Regional Manager of Foster (488) shows how shippers have come to rely in the past years on the job the Interstate Commerce Commission does. He states that shippers now can simply assume that any carrier who comes in is certified.

However, the overriding consideration remains the same. Foster had a duty not to knowingly break the law. However, it did not have a duty to investigate every truck which pulled into its yards to make sure that the driver was not breaking the law. A duty like this would make every shipper a little arm of the Interstate Commerce Commission. This would

be too onerous a burden for the shipping industry to bear. That there is no duty to inquire is the same conclusion reached by many of the courts who have considered the question involving similar violations of the Interstate Commerce Act and analogous state regulatory acts. See discussion of *Moore, supra* at page 38, *DeBord, infra,* at page 59, *Chickasha, infra,* at page 62, and *Barsh, infra,* at page 64.

In short, the record shows no evidence that Foster knew that Knight was uncertified. In addition, the plaintiff introduced no evidence from which it can be inferred that Foster should have known this. Because of this failure to sustain his burden of proof, plaintiff was not entitled to have this theory of his case go to the jury, and there is no substantial evidence to support the jury's finding.

2. NO SHOWING THAT FOSTER KNEW OR SHOULD HAVE KNOWN THAT TRANSPORT SUPPLY WAS CHARGING LESS THAN THE MINIMUM RATE.

Having failed to sustain by substantial evidence his allegation that Foster should have known that Knight had no certificate, plaintiff was not entitled to proceed on the theory that Foster knew, or should have known, that the amount of charges by Transport Supply to Foster for such shipment were less than that which could be charged by any certified carrier. However, assuming arguendo that plaintiff did provide substantial evidence as to Knight, plaintiff still must be denied recovery since he failed to prove by substantial evidence the second of the conjunctive requirements.

Plaintiff attempted to prove that Foster had actual knowledge of the price by two methods. First, he introduced over objection, evidence of two prior dealings with Transport Supply by Foster through two witnesses (testimony of James Connors (14-23) to which defendants objected (17 and 24), testimony of Jack L. Steward (267) to which defendant objected (269)) and exhibits 6(a) and 6(b). Testimony of both of these witnesses was that Exhibit 6(a) showed that Foster had sent a load out with Transport Supply on November 24, 1963 (19 and 276). They also testified that another load had been sent out by Transport Supply on December 3, 1963 (22 and 279). However, Mr. Steward testified that the invoice by which Transport Supply billed Foster was not even prepared until December 14, 1963, some seven days after the shipment in question was picked up by Knight (278). While plaintiff did not bring out the billing date of the December 3rd shipment, examination of exhibit 6(b) shows that this bill was not prepared by Transport Supply, an Oregon Corporation, much less delivered to Foster's San Francisco office, until December 7th, the morning of which Knight picked up the steel from the San Leandro yard.

Thus, examination of the evidence clearly shows that Foster could have been put on notice by virtue of these two prior dealings because they did not receive any bill from Transport Supply until after Knight had left with the load in question.

The plaintiff also attempted to introduce some material from which he desired the required inference would be drawn by his questioning of the Foster salesman. Here again the effect of the regime of the Interstate Commerce Commission is seen. The sales-

men know from experience it does no good to shop around for a bargain rate. The carriers all charge what the ICC will let them. In addition, they know that the ICC will not let the shippers be gouged. Thus, there is no reason to inquire about price, the main thing, is do you have a big enough truck and how soon can it be here (534 and 549). The situation is reasonable. The Interstate Commerce Commission has done its job well. It has brought economic stability to the shipper-carrier relationship. Competition is now conducted mainly in areas of service, availability and equipment. Price-cutting and discrimination are no longer significant factors which a shipper must consider.

Thus, the record shows that plaintiff failed to establish from the previous transactions that Foster had actual knowledge of Transport Supply's lower rates. In addition, plaintiff did show an ordered economic sector wherin the price to be charged for services, previously the prime overriding consideration, has become substantially subordinated to other considerations.

Plaintiff did not sustain his burden of proof to come forward with substantial evidence that Foster knew or should have known that Transport Supply charged less than the minimum rate. This theory of the case should not have been submitted to the jury.

B. THE ACT IS INAPPLICABLE IN THIS CASE.

1. PLAINTIFFS ARE NOT WITHIN THE GROUP SOUGHT TO BE PROTECTED BY THE STATUTE.

It is generally accepted that the standard of con-

duct required of a reasonable man may be prescribed by legislative enactment. However, it is not every provision of the criminal statute or ordinance which will be adopted by the court in a civil action for negligence. As is stated in Prosser, *Torts,* page 193 (3rd ed. 1964):

> There are statutes which are considered to create no duty of conduct toward the plaintiff and to afford no basis for the creation of such a duty by the court.

This rule is clearly applicable in Washington. The best statement of this rule is found in the case of *Cook v. Seidenberg,* 36 Wash.2d 256, 217 P.2d 799 (1950). Here was a case where a landlord, the defendant, had wilfully refused to provide heat for the tenants as required by a city ordinance. With his knowledge, many of the tenants purchased plug-in electric heaters. One morning, as one of these heaters was being used to supply the heat which the landlord was directed by law to provide, the plaintiff's child's nightgown became ignited and caused serious injury to the child. The court, after a discussion of the question whether the ordinance was aimed at this kind of injury (which will be treated *infra),* stated (page 259):

> We have several times applied the analogous principle set forth in clause (a) of Section 286 Restatement of Torts, to the effect that the violation of a statute, or ordinance is not actionable negligence except with reference to persons intended to be protected by such statute or ordinance.

In the case of *Short v. Hoge,* 58 Wash.2d 50, 360 P.2d 565 (1961), the plaintiff alleged negligence after she fell down the stairway between the 17th and 16th

floors of the Hoge Building in that there was no handrail as required by city ordinance. On page 54 of the opinion, the court set forth the elements plaintiff would have to prove in order to succeed in her action.

> In order to establish a *prima facia* case on her theory of negligence *per se,* it was necessary for the appellant to prove (1) the existence of the ordinance, (2) its violation, (3) that such violation was the proximate cause of her injury, and (4) that she was within the class of people that the ordinance sought to protect.
> [citing *Cook,* supra].

In the last case to come down from the Washington Supreme Court on this point, *Morgan v. Washington,* [Wash.2d], 71 Wash.D2d 812, 430 P.2d 947 (1967), the court was faced with a wrongful death action against the state. This arose after a two-year-old wandered onto Interstate Highway 5 and was killed. Plaintiffs contended that statute and highway department policy statements required the state to control access to the highway, and their failure to control was the proximate cause of injury. The court stated (page 814):

> In any event, it is clear from the language of the statute and the policy statement, that both are intended for the protection of users of the highway, and were not intended to render the state liable to persons who might go onto the highway in violation of the access regulations. Only persons in the class for whose benefit a statute was enacted can claim its benefits.

These three cases show without question that in Washington the rule is that a plaintiff who is basing an allegation of negligence on the violation of a

statute or ordinance must prove that he is an individual whom the statute was intended to protect. Failure to prove that he comes within the protective ambit of the statute results in a collapse of the of the plaintiff's cause of action.

2. THE HARM SUFFERED IS NOT THAT WHICH THE ACT WAS INTENDED TO PREVENT.

In Washington, the rule is that in order to succeed in a negligence action alleging violation of an ordinance as negligence, the plaintiff must prove that the kind of injury involved was that which the ordinance violated was designed to prevent. This requirement was stated in *Cook,* supra. Here the court in a lengthy discussion of the requirements of a negligence action based upon an ordinance violation set forth the following:

> "The violation of a city ordinance is negligence *per se.* [citing cases] But it is fundamental that such negligence is not actionable unless the statute or ordinance violated was designed to prevent the kind of accident and injury involved in the particular case. [citing cases from Oklahoma, Kentucky, Texas, South Carolina and Prosser]. A statement of this principle, which has been quoted with approval in many cases, is that set forth in 38 Am. Jur., *supra:* 'It is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him.' "

This position was reiterated in the case of *Currie v. Union Oil Co.,* 49 Wash.2d 898, 307 P.2d 1056 (1957).

The question now is, under Washington law, what class of persons were to be protected by the act and what type of risk of harm was the Act designed to prevent. The Interstate Commerce Act has been the subject of extensive litigation ever since its inception in 1887. The act has been many times before the United States Supreme Court, and the supreme courts of the states. There have been many occasions when these courts have passed upon the question of what was the object of the Interstate Commerce Act. One of the earliest interpretations, coming only 5 years after the enactment of the Interstate Commerce Act, is found in the case of *I.C.C. v. Baltimore & O. R.R.,* 145 U.S. 263 (1892). The court, before it turned to the relative merits of the question before it, stated:

> "The principle objects of the Interstate Commerce Act were to secure just and reasonable charge for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter and for a longer distance over the same line; and to abolish combinations for the pooling of freights."

Casual reading of this statement clearly shows that the thrust of the Interstate Commerce Act was towards economic relations among shippers and carriers. This is borne out by the following cases from the United States Supreme Court: *Louisville & N. RR v. United States,* 282 U.S. 740 (1931). *Midstate Horticultural, Inc. v. Pennsylvania R.R.,* 320 U.S. 356 (1943).

In a later case, *New York v. United States,* 331 U.S. 284 (1947), the Interstate Commerce Commission had

found discriminatory rates in favor of the northeast portion of the United States and ordered a lowering of western rates and an increase in northeastern rates. The court started its opinion thus (page 296):

> "*First.* The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations. [citing *Louisville & N. RR, supra.*]

Expression of a similar view, if not the same view, is found in the state court opinions. The case of *New York, N. H. & H. R. R. v. California Fruit Growers Exch.,* 125 Conn. 241, 5 A.2d 353 (1939), is typical. This was an action by the railroad to recover shipping charges. The court, in its discussion of the Interstate Commerce Act, said (page 360):

> "The aim of the Interstate Commerce Act was to secure for each and every shipper of goods in interstate commerce absolute equality of reasonable rates, uniform in application without discrimination or preference."

The obvious theme running throughout all of these cases is that the Act is intended for a very special purpose. It is aimed at establishing economic stability between shippers and carriers. It is designed to protect shippers and carriers from the disastrous price wars, rate cutting, discriminations and secret rebates which typified the situation prior to the enactment of the Interstate Commerce Act. The harm which the statute was intended to prevent was injury to shippers or carriers by virtue of these practices. There was, of course, a benefit intended to the whole of society. However, this was only an indirect benefit resulting from stability in the shipping industry. The group which was specifically to be protected by this legisla-

tion was the shippers. They were to be no longer at the mercy of the carriers. The activities of the carriers would be watched over from then on. The rates which they set and collected would have to be fair. In addition, the carriers would also benefit to a large extent. They no longer had to fear price wars with other carriers nor be forced to acquiesce to the extortive demands of large shippers. The injury to be prevented by the Act are the kinds of economic injury concomitant with the practices of price wars, rebates, discrimination, and extortion.

The record shows that plaintiffs are neither carrier nor shipper. The injury complained of is personal, not economic. While it might be argued that one of the benefits derived from the regulatory regime of the Interstate Commerce Act is highway safety, this was obviously not the motivating factor behind the Act. Plaintiff can make no claim under the Act since it was passed neither for their benefit personally nor to prevent their type of injury.

C. Violation of the statute was not the proximate cause of plaintiff's injury.

Assuming arguendo that Foster violated the Act and assuming further that the plaintiffs are within the scope of those who are to be protected and assuming further that their injury is the type of injury which the statute was designed to prevent, the plaintiffs must still be denied recovery because the evidence shows a lack of causal connection between the assumed violation and their injuries. The Washington rule was reiterated again recently in the case of *France vs. Peck.*, ...Wash.2d...., 71 Wash.D.2d 580, 430 P.2d 513 (1967). The court noted that they had

been faced with the question of statutory violations and the consequent harm on a number of occasions (p. 584):

> "The general rule for determining causal connection is set out in *Berry vs. Farmers Exchange,* 156 Wash. 65, 67, 286 Pac. 46, 47 (1930):
>
> 'That violation of an ordinance, generally speaking, is negligence, there can be no dispute, but the law is well-settled that there must be a causal connection between the negligence arising from the violation of the ordinance and the accident itself before a cause of action arises from such violation.' "

The degree of proof which a party must sustain in order to proceed with his cause of action was set forth in the case of *Ward vs. Zeugner,* 64 Wn.2d 570, 392 P.2d 811 (1964). Here the court said (574):

> "Even though plaintiff violated the statute and was thereby guilty of negligence, per se, such does not bar plaintiff's recovery or warrant submitting such violation to the jury, unless there be substantial evidence, as distinguished from a mere scintilla, that the violation proximately contributed to causing the accident."

This requirement of Washington law that substantial evidence, not a scintilla of evidence, of a party's negligence and proximate causal relationship between the negligence and plaintiff's injuries was recognized by this Court in the case of *Ross vs. Great Northern R.R.,* 315 F.2d 51, (9th Cir., 1963). Therein this Court said (page 56):

> "Substantial evidence of appellee's negligence and the proximate causal relationship between it and appellant's injuries are required under Washington law. Substantial evidence is required, and

a 'scintilla' of evidence is insufficient under that law."

The particular question of whether a violation of the Interstate Commerce Act, by a shipper's use of an uncertified carrier, can render that shipper liable for negligence on the part of the carrier's employees or contractors has been passed upon several times by both Federal and state courts. The answer to the question has been uniformly that there is no possible causal connection between the use of an uncertified carrier and any injuries resulting from that carrier's negligence. An early case to discuss the question was that of *DeBord vs. Proctor & Gamble Distrib. Co.,* 146 F.2d 54 (5th Cir. 1944). Defendant, Proctor & Gamble, had contracted with White Star Transit Company for the latter to drive one of Proctor & Gamble's trucks from Cincinnati, Ohio, to Rome, Georgia and to there return it to the defendant. The District Judge entered judgment for the defendant. On appeal, plaintiff contended that the lack of an Interstate Commerce Certificate on the part of White Star made the defendant liable. In reply to this contention, the court said (page 57):

"We think it quite plain that the owner had no duty to ascertain whether the motor carrier had complied with the Act, and that the acts of the carrier in performing the contract subjected the owner to no liability, (citing *Marion Machine,* infra at p. 63). But whether so or not is beside the point. The liability here asserted is not one for driving an automobile without a license, but one for damages proximately resulting from the negligence of one for whose action the defendant is responsible. There was no proximate causal connection between driving the car without a license and the injury. The White Star, itself, would not have been liable for injuries caused

while the car was being so driven unless there was actionable negligence proximately causing them (citing cases). For a much stronger reason the defendant would not be, for the evidence showed affirmatively that the truck which plaintiff claims caused his injuries was not in the control of, or being driven by, the defendant or by someone in his employ or under his direction.

"There is nothing mysterious or recondite about the theory on which liability was denied in this case. The burden was on the plaintiff to prove that defendant, or someone for whose action he wsa responsible, was negligent. He did not prove this. On the contrary, the evidence established that the negligence complained of was not that of the defendant or its servants but of a servant of an independent contractor whom the defendant had employed to do a job for him, reserving no direction or control over the manner or means of doing it. The case, therefore, failed because the element necessary to recover, that the defendant's conduct has been wrongful, has not been proven. The law does not prohibit, it permits, the making of independent contracts. The only thing the defendant did here was to make such a contract. It reserved no control over, it had nothing to do with, its performance. For acts of an employee of the contractor causing damage, it is the contractor and not the owner who must be looked to."

In a more recent case from the Seventh Circuit Court of Appeals, the same result as in *DeBord,* supra, was reached. This was the case of *Kenosha Auto Transp. Corp. vs. Lowe Seed Co.,* 362 F.2d 765 (7th Cir. 1966). In this case the plaintiff contracted to take a caravan of vehicles from Rossford, Ohio, to Baker, Oregon. The vehicles included several wide loads. The accident giving rise to the action occurred when defendant attempted to pass one of the vehicles

on the highway in Illinois. Defendant contended that he should have been allowed to introduce the provisions of the "Illinois Policy On Permits" to show that the plaintiffs were operating in violation of them. The court on appeal concluded that they were properly excluded because the alleged violation was not a proximate cause of the accident. The court remarked (page 769): "[I]t would be just as logical to reason that the presence of plaintiff's caravan on the highway was the proximate cause as to claim that the violations were." For the proposition that lack of a permit is immaterial unless proximate cause is shown, the court cited *DeBord,* supra, and *Hoover,* infra.

The case of *Hoover vs. Allen,* 241 F.Supp. 213 (S.D. N.Y. 1965) was an action by stockholders for dissolution of a company and for an accounting. The particular point being considered in the latter part of the opinion (page 257) was whether the failure of the company to register as an investment company in any way affected the alleged waste. The court offered the following analogy to explain why there was no causal connection between the failure to register and the injury alleged.

> "We are here dealing with a situation exactly the same as if a cause of action were brought in a federal court under the Interstate Commerce Act containing the following hypothetical allegations: (1) contrary to 49 U.S.C. Section 306(a) (1), defendant operated a common carrier by motor vehicle in interstate commerce upon a pubic highway without their being in force with respect to such carrier a certificate of public conveyance and necessity issued by the ICC. (2) While so operating in violation of Section 306(a) (1), a motor vehicle owned and operated by defendant was negligently driven through a red

light, hitting and injurying plaintiff.

> "Obviously, in the suppositious case, there is no casual connection between the lack of a certificate of public conveyance and necessity and defendant's negligently driving through a red light. *Newsome vs. Dunn,* 103 Ga. App. 656, 120 S.E. 2d 205 (1961); see *DeBord vs. Proctor and Gamble Distributing Company,* 146 Fed. 2d 54, 57 (5th Cir. 1944).
>
> "By a parody of reason, there is in the case at bar, no causal connection between the mere failure to register and the alleged acts of corporate waste."

Prosser analyzes the situation this way.

> "When a car is driven without a license, the act of driving the car certainly causes a collision; the absence of the license, or the existence of the statute, of course, does not. What the statute does, or does not do, is to condition the legality of the act, and to qualify or characterize it as negligent. Upon cause and effect it has no bearing at all." Prosser, *Torts,* page 195 (3rd Ed. 1964).

The conclusion reached by the Federal courts as to the lack of causality between failure to have a license or a certificate and subsequent injury has also been reached by state courts. One of the early cases was *Bradley vs. Chickasha Cotton Oil Company,* 184 Okla. 51, 84 P.2d 629 (1938). In this case the plaintiff had been struck by a truck being driven by one Mr. Walters. This driver was the employee of a Mr. Moore, the owner of the truck. The trial court dismissed Chickasha, the shipper, as a defendant and plaintiff appealed this. The facts reveal that Chickasha had a contract with Moore calling for Mr. Moore to deliver defendant's cotton oil. The court in its discussion

pointed out that Moore was a class B motor carrier, but had no class B permit. Rather, he was operating under Chickasha's Class C permit. For the purpose of discussion, the court assumed this procedure to be invalid. Thus, the situation with which the court was working was one wherein a shipper knowingly allowed an uncertified carrier to haul its goods. The court said (84 P.2d at p. 632):

> "With respect to this phase of the question, the legal situation is similar to instances where one loans his license plates to another, or loans his auto to an unregistered or unlicensed person without knowledge of carelessness of the driver. In such instances, although the owner is usually violating the law, just as the driver himself is violating the law, he is not held to civil liability for injury to third persons unless the violation and the injury had causal connection."

The court then cited cases from many jurisdictions for this rule and concluded that there is no causal connection between a shipper shipping on an uncertified carrier and a subsequent accident. This principle was shortly thereafter reaffirmed in the case of *Marion Machine, Foundry & Supply vs. Duncan,* 187 Okla. 160, 101 P.2d 813 (1940). The defendant (Marion Machine had contracted with a private carrier for the latter to haul oil tubing belonging to the defendant from Texas to Oklahoma. While the truck was being operated by the carrier's employees, the accident occurred. There was evidence that the carrier did not obtain a permit for this trip. The Court pointed out the rule that the failure of the carrier to have a permit would not give rise to negligence on the part of the shipper unless there was a causal connection between failing to obtain the permit and the accident. The court could find none. After a discussion of the general liabilities of a

principal for engaging an independent contractor, the court stated (101 P.2d at 816):

> "Ordinary hauling by truck is neither inherently dangerous nor unlawful. The shipper is under no duty in this state to ascertain whether the motor carrier has complied with the motor vehicle laws or to inquire into the nature and adequacy of his equipment."

The case of *Barsh vs. Mullins,* 338 P.2d 845 (Okla. 1959) is very similar to the case under consideration. Here the plaintiff was suing the shipper of goods and the carrier. The plaintiff alleged a conspiracy among the shipper, the carrier and a second carrier to illegally make use of the former carrier's Interstate Commerce Certificate. One of the problems plaintiff ran into, however, was that of releases. For this reason, he had to prove independent negligence on the part of Kerr, the shipper. One of the allegations of independent negligence charged against the shipper was that it permitted the second carrier to haul its shipment in interstate commerce knowing that this second carrier did not have an ICC permit. The court stated (page 851):

> "If this was negligence per se considered independently of the conspiracy, for the reason that it constituted Kerr an aider and abetter in violation of Federal statutes governing shipments in interstate commerce, such negligence alone had no causal connection with the accident. [citing *Chickasha,* supra.] Plaintiff argues that there was causal connection in that if Barsh Produce Company [the second carrier] had been licensed by the Interstate Commerce Commission, they could not have employed an unqualified driver. This does not follow. It is true that Hall was not a qualified driver according to the Interstate Commerce Commission's safety regulations but even if

> Barsh Produce Company [the second carrier] had been licensed, they could have, nevertheless, employed an unqualified driver if they so desired."

Plaintiff also made a contention that Kerr, the shipper, was guilty of independent negligence in that they failed to check the qualifications of the driver. In the syllabus by the court, it rejects this contention out of hand.

> "A shipper is under no duty to inquire into the qualifications of an independent motor carrier's driver."

Thus keeping in mind the Washington rule that there must be substantial evidence of the causal connection between the injury complained of, and the alleged negligence, the record shows that plaintiff failed to bring forth sufficient evidence to make this a jury question. In fact, the record shows that this was not a question for the jury, for there could be no possible causal connection between the assumed violation of the statute and the harm sustained. The record shows that the injury came as a result of brake failure, and this failure was in turn caused by the failure of the driver to either check his brakes or to properly adjust them during the trip. In any event, it is clear that the accident occurred not because Foster entrusted his goods to an uncertified carrier, but because the driver of the truck failed to check his brakes. It is only by engaging in the sheerest form of speculation that it can be said that if the carrier were certified, then the driver would have checked his brakes. This is meaningless guessing. The proximate cause of the accident was Knight's negligence. This was the only cause of the accident. Whether or not Foster knowingly gave his goods to an uncertified driver or

whether or not Foster knowingly shipped for below the minimum rate are irrelevant considerations on the issue of what was the proximate cause of the accident.

As noted above, the courts have uniformly held that there can be no causal connection between a shipper entrusting his goods to an uncertified carrier, and any subsequent injury resulting from negligence on the part of the carrier's independent contractors or employees. There was no legal basis for the trial court to submit this issue to the jury, and the court erred in so doing.

IV. THE RIGHT TO A NEW TRIAL BECAUSE OF SPECIFIC PREJUDICIAL RULINGS.

Appellant's position is that the lower court should have entered judgment for the reasons heretofore stated, and that it also, under Rule 50, should have granted a new trial. If this Court is of the view that the reasons already given did not warrant a directed verdict, those reasons as well as the additional reasons treated in this part of the brief should be considered in determining whether there should not be a new trial. As was stated in *Aetna Casualty & Surety Company vs. Yeatts,* 122 F.2d 350, 352-3 (4th Cir. 1941):

> "On such a motion it is the duty of the Judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

Of course, in a long trial where many rulings are made, the mere existence of error is insufficient to reverse a lower court for refusing to grant a new

trial. Where, however, as is believed to be true in this case, there is fundamental and prejudicial error in a single ruling or in an aggregation of rulings, reversal is appropriate. Each one of the points treated herein, therefore, is presented not only for its individual merit but also for its overall significance.

A. THE CHARGE AS TO WHAT WOULD CONSTITUTE VIOLATION OF THE ACT WAS REVERSABLE ERROR.

The Court's instruction on Sec. 322 (c) was erroneous. The Court's instruction said (892) (R. 616):

> "The third ground of recovery asserted by plaintiffs against the defendant Foster Company is based on a violation of the Federal Interstate Commerce Act. This law of the United States provides it shall be unlawful for:
>
> "'Any shipper, or any officer or employee thereof [to] knowingly accept or receive any [rate] concession in violation of any provision of the [Interstate Commerce Act.]'
>
> "For convenience, this section of the law will be referred to as 'Section 322.'"

and then the Court said (893):

> "If you find it has been established by a fair preponderance of the evidence that employees of Foster Company at or prior to the time the cargo of steel in question was loaded at San Leandro, California for interstate shipment to the State of Washington knew, *or in the exercise of reasonable care should have known:*
>
> "1. That the defendant Knight did not hold a valid certificate or permit issued by the Interstate Commerce Commission authorizing Knight or his vehicle to perform interstate transportation of the shipment, and

> "2. That the amount of charges by Transport Supply Company to Foster Company for such interstate transportation was less than the minimum rate Foster Company would have been required to pay for such transportation by a carrier, which was certified by the Interstate Commerce Commission, then you may find that Foster Company, as a shipper, violated the above stated provision of Federal Law, Section 322, and such violation, if you find it occurred, would constitute negligence as a matter of law." (Italics added)

Thus, the Court said the jury could find that a statute, which required *actual* knolwedge for its violation, had been violated even without the requisite actual knowledge. This does not make good sense and it is not the law.

The statute clearly requires by the plain meaning of its words a knowing violation. In a criminal case this knowledge must be proved beyond a reasonable doubt. In a civil case the plaintiff must at least prove knowledge by a preponderance. However, the charge to the jury did not require that the plaintiff prove actual knowledge by a preponderance. It only required him to prove that Foster should have known. This is not sufficient to show violation.

The question of what constitutes knowing violation of the Act has been treated by several courts. In the case of *Inland Freight Lines vs. United States,* 191 F.2d 313 (10th Cir. 1951) the court had on appeal a conviction for knowingly keeping false drivers' logs as a part of its records. In referring to the trial court's instruction, the court said (316):

> "The primary substance of the instruction was that *mere negligence* on the part of the company

in accepting the false logs without investigating as to their falsity was sufficient to warrant a conviction." (Italics added)

The Court held the instruction to be prejudicial error and reversed and remanded.

In a more recent case, *United States vs. Joralemon Bros., Inc.,* 174 F.Supp. 262 (E.D.N.Y. 1959), the Court was faced with an alleged violation of the act on the part of a motor carrier. The Court said mere occurrences of violations would not constitute criminal acts. "A knowing and willful act, within the meaning of the aforesaid statute, is one that is conscious and intentional, deliberate and voluntary, rather than merely negligent." (P. 263).

Thus, it is clear that the statute is not like most criminial statutes used to form a basis for civil liability growing out of an automobile accident, as for example, speed limit law, rules of the road, and equipment statutes. It requires a knowing violation. Nothing less will sustain a finding of violation. No mere negligence is sufficient. Under the charge, if the jury felt Foster should have known it was violating the act, then they could find it knew it was violating the act. This error undermines the whole consideration of the jury and is sufficiently prejudicial to warrant a new trial.

B. ADMISSION OF TESTIMONY REGARDING THE REPUTATION OF THE CLASS OF UNCERTIFIED CARRIERS.

Since plaintiff was unable to produce one witness, or one piece of evidence concerning the antecedent reputation of Transport Supply, he attempted to dis-

charge this burden by the witness, Mr. Landsburg (640). He testified that in his experience with the ICC, he had become aware of a problem with the class of uncertified carriers (643). He also testified that it was common knowledge among "people in the shipping industry, for instance, certainly in the regulatory industry" (647) that uncertified carriers did in fact operate. He then went on to give a long statement concerning how some shippers would get together with some uncertified carriers and cut rates. He concluded with the statement that these "people ultimately go broke and they leave sometimes bloody accidents . . . " (650). He also testified that ICC road checks reveal that in the majority of cases uncertified carriers' equipment was in bad condition (651).

To all of this testimony the defendants strenuously objected urging "proof of what some other group of people do is no proof of what another does at a specific time or place" (643), and "any law enforcement agency has problems, and that doesn't mean that some specific individual [whereupon the court cut him off, 644]" and "he [plaintiff] is going to try to prove a reputation of one person by the reputation of a class, which is not proper" (645).

In a tort action, the trier of the fact is to be concerned only with what certain people did on certain occasions under certain circumstances. Testimony as to what other people did on other occasions under unknown circumstances has no bearing on the issues involved, and is therefore irrelevant, and hence, inadmissible. The witness's entire testimony was taken up with what he had observed other people do at other times. The witness did not once refer to the defendant Transport Supply or to the defendant Knight or to

the defendant Foster. Rather he stated that sometimes uncertified carriers and shippers get together and leave "bloody accidents" on the highway. This, it is submitted, was absolutely irrelevant to any issue in the case. But more than that it was disastrously prejudicial to Foster. This witness's irrelevant testimony left the clear impression that Foster and Transport Supply had gotten together for an illegal deal in which they cared not how many bloody bodies were strewn along the roadside. The thrust of this witness's testimony was to tell the jury here is your chance to help clean up the highways by laying liability to the shipper.

The general rule is that evidence of the reputation of an individual for negligence is inadmissible. See *United States vs. Combania Cubana DeAviacion,* 224 F.2d 811, 820 (1955); 29 Am.Jur.2d, *Evidence* Section 316; McCormick, *Evidence* Section 155 (1954); 5 Wash. Prac. Section 3 (1965). An exception allows in evidence of an *individual's* reputation when that *individual's* reputation is in issue. See 5 Wash. Prac. Sec. 2 (1965); 29 Am.Jur.2d, *Evidence* Sec. 337; McCormick, *Evidence* Sec. 154 (1954). However, nowhere is it ever hinted that a party may prove the reputation of an individual by proof of the reputation of a class of which he is a member. In fact it follows a fortiori from the rules stated above that this kind of testimony is always inadmissible.

The plaintiff claimed that the evidence was admitted only to show what Foster should have known (645). How this witness would know what a shipper would know, or should know, was not shown except by the bootstrap technique of the witness himself. Moreover, the court did not instruct the jury that this witness

was testifying only as to what Foster should know. The net effect of the testimony was to tell the jury that here is your chance to help the ICC in a problem whether or not this particular defendant was negligent. The admission of the testimony of this one witness threw the whole fact finding procedure out of alignment, and this is grounds for a new trial.

C. THE REPETITIVE ADMISSION OF EVIDENCE AS TO UNLAWFUL RATES WAS ERROR.

Since plaintiff had no substantial evidence to support his theories, he had to rely on the techniques of confusion and prejudice. He used the prejudice mainly with Mr. Landsburg. With the witnesses Connor and Stewart he pursued the course of confusion. Plaintiff's efforts with these two witnesses were largely centered in attempting to convince the jury that Foster was on trial for shipping at an illegal rate. He went through each of the four invoices sent by Transport Supply to Foster, and inquired as to each whether this was a lawful rate. Each of the two witnesses dutifully replied that this was not a legal rate (20, 23, 27, 31, 277, 280, 285, 287, 288, 289). All of this, despite the fact that only two of the invoices were for shipments before the one in question, and that none of them were in fact even received by Foster prior to the shipment in question.

By the time plaintiff stopped hammering in the fact that Transport Supply did not charge the legal minimum, the jury was well-convinced that this was more of a criminal case than a civil case and that they should convict Foster of something somehow. The latter two exhibits to which these witnesses were referred (6(c) and 6(d)) were absolutely irrelevant to

any issue in the case since they were not prepared until after the accident in question. In addition, all of the exhibits (6(a), 6(b), 6(c) and 6(d)) were inadmissible since none arrived prior to the shipment in question, and the charges reflected therein could not possibly be a proximate cause of the accident.

The court's allowing of plaintiff to confuse and mislead the jury in this manner was reversable error.

D. THE ADMISSION OF EVIDENCE AS TO WHAT A CARRIER WOULD LOOK FOR WAS ERRONEOUS.

The witness Cusick testified as to what he as an ICC certified carrier would look for on a new truck he was leasing (454). The defendant moved to strike all of his testimony as irrelevant (456). The court instead of granting this motion told the jury they could use the testimony in any way they wanted (457).

The admission of this testimony in the first place was clearly erroneous. The testimony of what a certified carrier would look for is irrelevant to the issue of what a shipper should look for. Most important, neither Foster, nor anyone else involved in this litigation, leased or rented any trucks or equipment of any kind whatsoever. Moreover, to compound the error and add to the confusion of issues which the plaintiff was pursuing, the court's ruling was error of such magnitude that, if for no other reason, justice demands that Foster have a new trial.

E. THE CHARGE ON THE APPLICABILITY OF SAFETY STATUTES AND REGULATIONS WAS REVERSABLE ERROR.

After the plaintiff had prejudiced the jury through Landsburg's "bloody accidents" and confused them through Connor's and Stewart's illegal rates, the court then magnificently compounded the whole mass of prejudice and confusion by instructing them that the safety statutes and regulations, which by their very language apply only to motor carriers, could be applied to the shipper (833, R. 157-159, App. Br. p. 28).

This one instruction alone threw the whole consideration of the case by the jury into areas where they should not have been allowed to go. It introduced irrelevant considerations to the determination of Foster's liability and allowed the jury to speculate wildly.

F. THE CHARGE AS TO PROXIMATE CAUSE WAS REVERSABLE ERROR.

The Court's charge to the jury on proximate cause (875-76 R. 153) was an erroneous statement of the Washington rule on proximate cause. The Court began with the instruction recommended by the Washington Supreme Court Committee on Jury Instructions, 6 Wash. Prac. Sec. 15.01 (1967). This is a one-sentence instruction which succinctly and clearly states the rule. However, the Court did not stop there. It went on and instructed that any act which it found was a necessary antecedent to the injury is negligence, using the following language:

> If a particular negligent act or ommission in-

itiates a series or chain of causation, in which each connecting causative factor is proximately caused by the preceding factor and in turn proximately causes a succeeding factor, and the unbroken sequence finally causes injury or damage, such end result, in law, is chargeable to the negligence which initiated the series or chain of causation.

This is the "but for" test of proximate cause. It is not the law in Washington.

A recent case to discuss the question of proximate cause was *Mehrer vs. Easterling,* ..... Wash. 2d ....., 71 Wash. D.2d 102, 426 P.2d 843 (1967). In the course of its discussion of legal causation, the Court quoted from an earlier opinion (Wash. D.2d at page 105):

> There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
>
> An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted 'but for' the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause.

Thus it is clear that the trial Court erred in giving a "but for" instruction on proximate cause. Since this instruction permeated every consideration by the

jury, the error constitutes reversable error.

CONCLUSION

Plaintiffs did not voluntarily choose to become involved in this lawsuit. However, once they did, they looked around at everyone who had even the remotest connection with the incident giving rise to the suit. In an accident resulting from a driver's inattention to his brakes they attempted to hold liable not only the driver and the owner of the truck, but also the carrier which had contracted with the trucker. In addition, plaintiffs reached back and attempted to place liability on the dealer who sold the truck. Finally, they attempted to lay responsibility, and hence liability, to the shipper which had sold the goods being transported to buyer.

There being no theory in law by which a principal is liable for the negligent acts of independent contractor's sub-independent contractor, the plaintiff pursued two other theories: (1) the selection of an incompetent independent contractor, and (2) violation of a statute. However it developed that plaintiff lacked an essential step in his first theory. There was no evidence of any antecedent negligence by the independent contractor. On his second theory, plaintiff was faced with the problem that he could not prove a knowing violation, could not show he was within the group of persons to be benefitted by the statute, nor even show that an assumed violation was a proximate cause of the accident. Thus, plaintiff proceeded with prejudice and confusion. He introduced testimony about the "bloody accidents" of uncertified carriers. He hit again and again on lawful rates until the jury thought they were trying a criminal

case. This was then compounded by the Court's defective instructions, particularly the charge which applied the motor carrier's statutes and regulations to the shipper and the faulty instruction on proximate cause.

The facts of this case and all fair inferences to be drawn do not establish any negligence on the part of appellants. To permit the verdict to stand notwithstanding the many prejudicial errors would cause an unjust result in this case. The judgment of the Court below should be reversed, and the appellants dismissed as defendants therein.

Respectfully submitted,

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Appendices

APPPENDIX AS TO EXHIBITS*

Number	*Page*
1	Not admitted
2A-F, Incl.	87
3A, B, C	193
4	667
5A, 5B	24
6	No reference in transcript
7	No reference in transcript
8	No reference in transcript
9	Not admitted
10	Not admitted
11	Not admitted
12A	Not admitted
12B	20
12C	20
13	For Court
14	Not admitted
15	162
16	For Court
17	667
18	No reference in transcript
19A	739
19B	740
19C	742
19D	742
19E	743
19F	743
19G	713
19H	715
20	Not admitted
21	For Court
22	761
23	173
24	177
25A & 25 B	578

*Almost all exhibits were identified prior to trial. They were to be admitted without further proof if otherwise admissible by being admitted that each was what it purported to be (R. 132). The page reference is to the transcript of the testimony where the exhibit was admitted in evidence.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

.....

Attorney for Appellants